80-629

Supreme Court, U. S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MAREN ENGINEERING CORP.,
Appellant,

vs.

KONSTANTIN VELMOHOS,
Appellee.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

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Questions Presented by the Appeal

The decision of the New Jersey Supreme Court below held that a foreign corporation, while clearly subject to long-arm, *in personam* jurisdiction in New Jersey, may nevertheless be permanently denied the benefit of an expired statute of limitations based on that state's tolling statute dealing with suits against foreign corporations. The highest court of New Jersey has therefore upheld the constitutionality of the state's tolling statute, N.J.S.A. 2A:14-22.

This result is anomalous and contradictory. It violates both the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution by denying to a foreign corporation, which although not registered to do business in New Jersey was at all times subject to that state's *in personam* jurisdiction, the rights of repose readily afforded by a statute of limitations to domestic corporations and even to another foreign corporation which, while by chance registered to do business in this state, was in fact served extraterritorially. Thus, the within appeal questions whether it is constitutionally permissible for a state to treat an out-of-state corporation as present for jurisdictional purposes but as not present for purposes of the tolling of the statute of limitations.

This appeal also implicates the unlawful burden on interstate commerce mandated by the New Jersey Supreme Court's opinion, namely, the requirement that every corporation, whether subject to *in personam* jurisdiction or not, register to do business and qualify as a foreign corporation in the State of New Jersey in order to ever receive the benefits of the defense of the statute of limitations.

Parties to the Proceeding

1. Konstantin Velmohos, Plaintiff-Appellee
2. Maren Engineering Corp., Defendant-Appellant
3. Nadusteo, Inc. (not a party to appeal; summary judgment granted below on grounds of expiration of statute of limitations)
4. Air Conveying, Inc., Defendant below

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JURISDICTIONAL STATEMENT

Opinions Below

Appellant requests review of the decision of the New Jersey Supreme Court, reported sub nom. *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980). The Court's opinion is submitted herewith as Appendix "A", p. 1a, *infra.*

The opinion of the intermediate appellate court, the Superior Court of New Jersey, Appellate Division, appears at 168 N.J. Super. 520, 403 A.2d 927 (App. Div. 1979). It is submitted herewith as Appendix "B", p. 24a, *infra*.

The Order of the trial court was rendered without a written opinion and is reproduced herewith as Appendix "C", p. 34a, *infra*.

Grounds for the Invoking of the Jurisdiction of this Court

The New Jersey Supreme Court affirmed the judgment of the State's Appellate Division which held that the statute of limitations was not available as a defense to the appellant corporation. The judgment of the Supreme Court was entered on June 18, 1980. A timely petition for rehearing was denied by that Court on July 21, 1980. That Order is submitted herewith as Appendix "D", p. 36a, *infra*.

The notice of appeal to the Supreme Court of the United States from the judgment of the New Jersey Supreme Court was filed with the Clerk of the State Supreme Court and with the Clerk of the Superior Court of New Jersey, Appellate Division, on October 9, 1980, and is submitted herewith as Appendix "E", p. 37a, *infra*.

The judgment of the New Jersey Supreme Court upheld the validity of a state statute, N.J.S.A. 2A:14-22, against federal constitutional challenge. Accordingly, this Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(2) which provides in pertinent part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Constitutional Provisions and Rules Involved

The Fourteenth Amendment to the United States Constitution:

Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the United States, Art. 1, §8, Cl. 3 (the Commerce Clause):

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

The New Jersey "Tolling Statute", N.J.S.A. 2A:14-22:

"If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the

sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said section, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation."

New Jersey's "Long-Arm" Rule, N.J.R. 4:4-4:

"Service of summons, writs and complaints shall be made as follows:

* * *

(c) Corporations, Partnerships, and Associations.

(1) Corporations. Upon a domestic or foreign corporation, by serving, in the manner prescribed in paragraph (a), either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the

> person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office."

New Jersey's Statute of Limitations for Personal Injury Actions, N.J.S.A. 2A:14-2:

> "Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued."

Statement of the Case

On August 3, 1973 while in the course of his employment at Container Corporation of America located in New Brunswick, New Jersey, Konstantinos Velmohos was injured in an industrial accident. He obtained a workers compensation judgment against his employer in 1975.

He thereafter commenced an action sounding in negligence and products liability on or about June 4, 1976, two years and ten months after the accident. In accordance with the terms of New Jersey's "long-arm" rule, N.J.R. 4:4-4(c)(1), the summons and complaint were served by mail at the following address for service:

> "Maren Engineering Corporation, an Illinois Corporation c/o David R. Brown, Registered Agent, 111 West 160th Street, South Holland (Cook County) Illinois 60673".

There was no dispute in any of the Courts below regarding the characterization of Maren's activities for purposes of "long-arm" jurisdiction. It remains undisputed that Maren had sufficient contact with New Jersey to subject it to *in personam* jurisdiction.

N.J.S.A. 2A:14-2, the New Jersey statute of limitations applicable to this action, requires that suits be commenced within two years of accrual of the cause of action.

In New Jersey, suits are commenced and therefore the statute of limitations tolled by the filing of a complaint with the Clerk of the Superior Court. N.J.R. 4:2-2. Thereafter the summons and complaint are served upon the defendant.

Plaintiff concededly filed his Complaint beyond the time set forth in the two-year personal injury statute of limitations. The claims, therefore, were barred on their face. Plaintiff sought, however, to avoid the bar of the statute of limitations by invoking in his Complaint the provisions of the tolling statute, N.J.S.A. 2A:14-22, by contending:

> "Defendant, Maren Engineering Corporation, an Illinois Corporation, did not, and does not maintain

> a registered office and a registered process agent, for service of process within the State of New Jersey, nor certificate nor report or record thereof on file with the Secretary of the State of New Jersey."

That allegation was admitted in the Answer filed by Maren. However, in its First Separate Defense, Maren asserted that the statute of limitations, as contained in N.J. S.A. 2A:14-2, was a bar to plaintiff's action.

On or about January 12, 1977, plaintiff obtained leave of Court to file an Amended Complaint naming as additional defendants, Nadustco, Inc. and Air Conveying, Inc., who were both foreign corporations and who were ultimately served by mail at their out-of-state corporate offices. On or about August 22, 1977, Nadustco was granted summary judgment dismissing the complaint against it with prejudice as barred by the statute of limitations. Although it was also a foreign corporation, Nadustco claimed entitlement to the statute of limitations defense because during the two years following the accident it had maintained an agent for service of process in New Jersey. Plaintiff did not oppose Nadustco's motion. A similar application for summary judgment made by Maren and also based upon the statute of limitations defense, while opposed by plaintiff, was nevertheless granted by the trial court on the ground that the tolling statute was unconstitutional as applied to foreign corporations amenable to service of process under New Jersey's long-arm rule.

On appeal by plaintiff, the intermediate Appellate Court reversed the Order of the trial court and held that the tolling statute did not deprive foreign corporations unregistered in New Jersey of their right to equal protection. Upon defendant's appeal the New Jersey Supreme Court affirmed the Appellate Division and held that the

tolling statute did not offend the equal protection or due process clauses of the Fourteenth Amendment.

Appellant initially raised the federal constitutional issues of equal protection and due process in its motion for summary judgment before the trial court. These arguments were pressed through intermediate appellate review and review by New Jersey's highest court.

The additional federal constitutional issue of the burden to interstate commerce was raised before the New Jersey Supreme Court. While that Court rejected the Fourteenth Amendment claims, it failed even to address the issue of the burden on interstate commerce.

This Appeal Raises Substantial Questions which Require Review by this Court

The question of whether a state may subject a foreign corporation, admittedly not registered to do business in that state, to its *in personam* jurisdiction while at the same time denying to that corporation the protection of a statute of limitations afforded all other defendants subject to the state's jurisdiction, consistently with due process and equal protection of the law, is a substantial and novel one. It has not been, but should be, addressed by this Court.

This Court has limited the reach of out-of-state service of process by requiring sufficient minimum contacts with a state so that a suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *State of Washington,* 326 U.S. 310, 316 (1945). In *World-Wide Volkswagen* v. *Woodson,* —— U.S. ——, 100 S. Ct. 559, 567, 62 L. Ed 2d 490 (1980), this Court described these limitations more concretely. Under the due process clause, it is not unreasonable for a state to subject a for-

eign corporation to its jurisdiction "if the sale of a product of a manufacturer . . . [arose] from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other states . . ." *See also, Oswalt* v. *Scripto, Inc.*, 616 F.2d 191, 198-199 (5th Cir. 1980).

In *Shaffer* v. *Heitner*, 433 U.S. 186, 202 (1977), this Court recognized that a foreign corporation doing business in a state could be deemed "present" in that state, and thus subject to service of process. Mr. Justice Marshall wrote for the Court:

> This basis for *in personam* jurisdiction over foreign corporations was supplemented by the doctrine that a corporation doing business in the state could be deemed "present" in the State. . . .

Concommitantly, the New Jersey "long-arm" rule, N.J.R. 4:4-4(c)(1), permits service of process upon nonresident defendants "to the uttermost limits permitted by the United States Constitution." *Avdel Corporation* v. *Mecure*, 58 N.J. 264, 268, 277 A.2d 207, 209 (1971).

Once New Jersey has determined a foreign corporation to be sufficiently "present" in the state to be amenable to its service of process, it must follow that such a foreign corporation should be afforded the right to plead the defense of the statute of limitations—a defense available to domestic corporations and to other foreign corporations also amenable to service through long-arm jurisdiction but who by chance may also maintain registered agents within the State. Yet in the instant case the New Jersey Supreme Court has determined that the appellant corporation was not sufficiently "present" to avail itself of the two-year statute of limitations. The New Jersey Supreme Court concluded that the statute of limitations would never be available to such a defendant. This novel decision de-

prives appellant of its Constitutional rights to due process and equal protection of the law. Such a decision requires review and reversal by this Court.

The purpose of the equal protection clause of the United States Constitution is to prevent irrational and arbitrary discrimination between persons similarly situated. *Reed* v. *Reed,* 404 U.S. 71 (1971). While a state may make rational classifications, a state may not provide that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. *Reed* v. *Reed,* 404 U.S. at 75-76.

New Jersey's distinction between appellant and its co-defendant, Nadustco, is arbitrary and has no such rational basis. Both companies are foreign corporations similarly situated. Both companies were served by mail at their out-of-state corporate offices in accordance with New Jersey's "long-arm" rule. Indeed, contrary to the rationale of the New Jersey Supreme Court, plaintiff never asserted any greater difficulty in serving Maren than in serving Nadustco. Yet, despite plaintiff's ease in service of process on both foreign corporations, Nadustco successfully asserted the bar of the statute of limitations while Maren was denied relief. Such a discriminatory result falls within the rule of *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415, (1920), that a classification "must be reasonable not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike." *Accord, Reed* v. *Reed,* 404 U.S. at 76.

Essentially, the rationale of the New Jersey Supreme Court focused on the presumed difficulties in serving out-of-state defendants. Such reasoning, however, is irrational

both on its face and as applied. In New Jersey, the filing of a complaint, naming any defendant, whether in-state or out-of-state, and not the time of service of process, tolls the statute of limitations against all so named. N.J.R. 4:2-2. In recognizing the rule's requirement that plaintiff attempt in-state service before utilizing "long-arm" service, the New Jersey Supreme Court has given judicial approbation to the irrational result of forever precluding the assertion of the statute of limitations by the long-arm defendant, regardless of when the defendant was served or when the complaint was filed.

If the expressed reason for tolling the statute of limitations for foreign corporations who are not represented within New Jersey is difficulty in effecting service, then the equal protection clause demands that the length of time that the statute is tolled bear a rational relation to that difficulty. Yet, despite these constitutional requirements, N.J.S.A. 2A:14-22 evinces no relation between the ease or difficulty of service of process upon an out-of-state defendant and the availability of the defense of the statute of limitations to such defendant. As such, it remains arbitrary, bearing no rational relationship to the legislative objective sought to be obtained, and, therefore, constitutionally infirm.

The due process clause of the United States Constitution similarly demands that the use of state power bear a rational relationship to a legitimate societal interest. *Richardson* v. *Belcher,* 404 U.S. 78, 81 (1971); *Lochner* v. *New York,* 198 U.S. 45, 53 (1905). As the long-arm provision extends the state's reach to out-of-state corporations, the legitimate state interest in denying a distant corporation the benefit of its statute of limitations is correspondingly diminished. N.J.S.A. 2A:14-22, as construed by the courts below, conclusively presumes that

foreign corporations without New Jersey registered agents are not amenable to service. This presumption, plainly contradicted by the appearance of such "long-arm" defendant, is irrational and is a deprivation of due process of law.

"Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973). In *Vlandis*, the state's presumption that an out-of-state student would forever remain an out-of-state resident during the course of study at a Connecticut college was stricken as a denial of due process of law. This presumption financially penalized the plaintiffs in *Vlandis*. By the same token, New Jersey's irrebutable presumption, as expressed in its 1949 tolling statute, that all out-of-state defendants are not subject to service of process despite their appearance in an action, is also invalid. "[A] statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Heiner* v. *Donnan*, 285 U.S. 312, 329 (1932).

The effect of the New Jersey Supreme Court's decision below in upholding the application of the tolling statute to Maren, is to unconstitutionally burden Maren's conduct of purely interstate business operations. The only mechanism available to Maren to avoid perpetual exposure to stale claims by dilatory plaintiffs in New Jersey is to qualify as a corporation authorized to do business within this state, thus subjecting itself to the requirements of not only designating a registered agent, but of maintaining an office, complying with various filing and reporting requirements and subjecting itself to state taxation. *E.g.*, N.J.S.A. 14A:13-3 *et seq.*, 54:10A-1 *et seq.*;

54:10E-1 *et seq.* Such requirements impose upon a foreign corporation engaged totally in interstate commerce a burden not countenanced by this Court's interpretations of the Commerce Clause.

In a series of cases beginning almost 100 years ago and continuing to date, this Court has summarily struck down similar burdens imposed by states on foreign corporations engaged solely in interstate commerce. *Allenberg Cotton Co., Inc.* v. *Pittman,* 419 U.S. 20 (1974); *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 (1821); *Sioux Remedy Co.* v. *Cope,* 235 U.S. 197 (1914); *International Textbook Co.* v. *Pigg,* 217 U.S. 91 (1910); *Robbins* v. *Shelby Taxing District,* 120 U.S. 489 (1887). As stated in *Dahnke-Walker, supra*:

> "A corporation of one State may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause." 257 U.S. at 291.

This court has consistently held that a state cannot condition a foreign corporation's right to sue in its courts to enforce a contract arising from its transaction of interstate commerce, upon qualifying to do business, filing certain information, or designating an agent for service of process. Only if such a condition were imposed on a company involved in intrastate or localized activities could such conditions be imposed consistent with the Commerce Clause. *Lilly & Co.* v. *Sav-On-Drugs,* 366 U.S. 276, 291 (1961); *Union Brokerage Co.* v. *Jensen,* 322 U.S. 202, 209 (1944). Since Maren is engaged totally in interstate, and not intrastate, commerce in New Jersey, this Court should

now hold that New Jersey cannot so condition Maren's effective defense of suits in New Jersey courts arising unavoidably from that interstate commerce.[1]

This is especially true considering that New Jersey has already provided plaintiffs with an available alternative to the tolling statute in its long-arm rule, N.J.R. 4:4-4(c)(1), read in conjunction with N.J.R. 4:2-2. As mentioned above, a New Jersey action is commenced by the filing of the complaint, thereby tolling the statute of limitations. Thus, a New Jersey plaintiff can commence an action within the limitations period by filing his complaint and search for the out-of-state defendant later. Upon a *pro forma* showing that the out-of-state corporation cannot be served in New Jersey, he may then have the summons and complaint mailed under the long-arm rule. Such an alternative provides ease of service for the plaintiff and at the same time protects defendants from stale claims. It accordingly imposes no burden on interstate commerce.

In sum, measured by any standard, this Court should hold that the tolling statute places on Maren's conduct of its interstate business a burden which is unlawful under the Commerce Clause.

The New Jersey Supreme Court's unequal treatment of foreign corporations subject to long-arm jurisdiction has resulted in unequal results throughout the Third Circuit.

Within the Third Circuit, Delaware and Pennsylvania have statutes which toll the statute of limitations for nonresident defendants. However, the highest courts of both Delaware and Pennsylvania have ruled that where the de-

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[1] It is irrelevant that the tolling statute does not on its face require Maren to qualify as a foreign corporation because the practical effect of the statute is to force Maren to do so. *International Textbook Co.* v. *Pigg*, 217 U.S. at 110-111.

fendant, although a non-resident, is amenable to service and thus subject to the state's jurisdiction, the tolling statute is inapplicable. *See e.g., Hurwitch* v. *Adams,* 52 Del. 13, 151 A.2d 286 (Del. 1959), *aff'd,* 52 Del. 247, 155 A.2d 591 (1959); *Will* v. *Malosky,* 432 Pa. 240, 247 A.2d 788 (1968). Yet recently, the Third Circuit held that a corporation which was subject to jurisdiction by virtue of New Jersey's long-arm statute was not afforded those same privileges.

In *Cohn* v. *G. D. Searle & Co.,* —— F.2d —— (Docket No. 79-2406 and 79-2605, 3rd Cir. July 23, 1980) the Third Circuit, under the principles enunciated in *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), accepted the reasoning and statutory analysis of the New Jersey Supreme Court in *Velmohos* v. *Maren Engineering Corp.,* 83 N.J. 282, 416 A.2d 372 (1980), and concluded that due process was not violated nor equal protection denied to foreign corporations by virtue of New Jersey's tolling statute. The Third Circuit's reversal of the reasoned opinion of the trial court in *Cohn* at 447 F. Supp. 903 (D.N.J. 1978) has resulted in uneven treatment within this Circuit. Therefore, the defendants in *Cohn* are petitioning this Court for *certiorari,* at the same time the within appeal is being prosecuted.

The District Court in *Cohn* concluded that the effect of the tolling statute, which was to distinguish between foreign corporations subject to service through representatives within the state and foreign corporations subject to service under the long-arm rule, bore no rational relationship to the object of the tolling statute and denied equal protection to foreign corporations amenable to long-arm jurisdiction. 447 F. Supp. at 912. The court also noted that its holding brought New Jersey into conformity with the majority of jurisdictions. *Id.* at 912.

The opinion of the District Court in *Cohn* was sound. The reversal by the Third Circuit—prompted by the New Jersey Supreme Court's decision in the case at bar—was in error. It has cogently been observed:

> Under the current statutory framework, a plaintiff maintaining an action against a nonresident has the option to proceed or postpone; the defendant is conclusively denied the right to interpose the defense of the statute of limitations. Through the plaintiff's utilization of long-arm procedures, in addition to deriving the benefit of the suspension of the limitation period, the nonresident defendant may be continually subject to the jurisdiction of the New Jersey courts while remaining totally unaware that an injured party is contemplating suit. The operation of the tolling provision poses a severe hardship to nonresidents in preparing an adequate defense, creates an irrational classification in regard to nonresident defendants amenable to service of process, and flaunts the purpose and intent of the statute of limitations. Comment, "The Tolling Provision of the Statute of Limitations—A Haven for the Dilatory Plaintiff", 10 Seton Hall L. Rev. 585, 590 (1980).

It is respectfully submitted that the judgment of the New Jersey Supreme Court is constitutionally infirm. The dissenting justice, Sullivan, J., was correct in observing that "the statutory construction of N.J.S.A. 2A:14-22 adopted by the majority also raises substantial questions of due process and equal protection of the laws" (83 N.J. at 298, 416 A.2d at 382).

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Date:: October 17, 1980

APPENDIX A

Opinion of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY
A-72/143 September Term 1979

KONSTANTINOS VELMOHOS, also known as VELMOHOS KONSTANTINOS,

Plaintiff-Respondent,

v.

MAREN ENGINEERING CORPORATION, an Illinois corporation, and AIR CONVEYING, INC., an Illinois corporation,

Defendants-Appellants,

and

NADUSTCO, INC., a Louisiana corporation,

Defendant.

Argued March 17, 1980—Decided June 18, 1980

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 168 N.J. Super. 520 (1979).

WILLIAM K. LEWIS argued the cause for appellant Maren Engineering Corporation (SHANLEY & FISHER, attorneys; MR. LEWIS and MOLLY B. CANNON, on the briefs.).

Appendix A

JOSEPH DIRIENZO argued the cause for appellant Air Conveying, Inc.

BARRY A. WEISBERG argued the cause for respondent (EDWARD J. DOLAN, attorney).

The opinion of the Court was delivered by PASHMAN, J.

This case raises the question whether the tolling provision of New Jersey's statutes of limitations, N.J.S.A. 2A:14-22, is unconstitutional as applied to foreign corporations that are not represented within the State but are amenable to long-arm service. Invalidation of the statute would render defendant corporations immune from suit in this State, since without the benefit of the tolling statute, the relevant limitations period has expired. We find the statute constitutional and accordingly uphold plaintiff's action as timely.

I

The facts are essentially undisputed. On June 4, 1976, plaintiff filed a complaint in the Superior Court, Law Division, seeking damages for personal injuries sustained by him on August 3, 1973,[1] as a result of an allegedly defective shredder-baler machine manufactured by Maren

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[1] Plaintiff's foot was caught in a conveyor which then drew his entire body into a machine. The accident occurred in the course of plaintiff's employment by Container Corporation of America in New Brunswick, New Jersey. Plaintiff successfully pursued a Worker's Compensation claim against his employer. He was found to have a 5% total permanent neurological disability and a 28⅓% total permanent orthopedic disability.

Engineering Corporation (Maren), an Illinois corporation.[2] The complaint was later amended to include claims against Air Conveying Corporation (Air Conveying), the designer of the machine, also an Illinois corporation.[3]

Both Maren and Air Conveying raised as a defense plaintiff's failure to file suit within the applicable two-year limitations period for personal injury actions. N.J.S.A. 2A:14-2. Plaintiff asserted that because neither defendant maintained registered offices or agents for services of process in New Jersey, N.J.S.A. 2A:14-22 tolled the statute of limitations and plaintiff's claim was timely.

On motions for summary judgment defendants claimed that New Jersey's tolling statute employed an unconstitutional classification in distinguishing between foreign corporations represented in New Jersey and foreign corporations which were unrepresented but amenable to long-arm service. In support of this contention, they cited *Cohn* v. *G. D. Searle & Co.*, 447 F.Supp. 903 (D.N.J. 1978). In that case the federal district court found that the differing treatment lacked any rational basis. It therefore held New Jer-

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[2] The complaint also named as a defendant George Swan, individually and trading as Swan Engineering Company, a New Jersey entity. By stipulation the complaint was dismissed as to Swan with prejudice on February 3, 1977.

[3] The amended complaint also added claims against Nadustco, Inc., a Delaware corporation with its principal office in New Orleans, Louisiana. However, Nadustco maintained an agent for service of process in New Jersey and was therefore not subject to the tolling statute. It sought dismissal from the action on the ground that the statute of limitations barred suit. Plaintiff did not oppose the motion, and the trial judge granted Nadustco summary judgment on August 22, 1977.

sey's tolling statute unconstitutional as applied to unrepresented foreign corporate defendants amenable to long-arm service.

The trial court adopted the reasoning of the *Cohn* decision. After requiring the defendants to demonstrate their amenability to long-arm service during the period in question,[4] the court granted their motions for dismissal. Plaintiff appealed to the Appellate Division.

Finding no basis for distinguishing the decision in *Lemke* v. *Bailey*, 41 N.J. 295 (1963), the Appellate Division considered itself bound by this Court's views on the tolling statute and held N.J.S.A. 2A:14-22 constitutional, reversing the trial court. 168 N.J.Super. 520 (App.Div. 1979). The court also observed that it was "not satisfied as to the correctness of the conclusion reached in *Cohn*" and noted that a later decision by a federal district court, *Hopkins* v. *Kelsey-Hayes, Inc.*, 463 F.Supp. 539 (D.N.J. 1978),[5] had reached the opposite conclusion on the same issue and had held the statute constitutional. 168 N.J. Super. at 526.

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[4] To that end, Maren had submitted an affidavit of its president outlining the corporation's business in New Jersey between 1969 and 1975. Similarly, Air Conveying presented an affidavit of its president listing sales negotiated and completed in New Jersey between 1969 and 1978. In view of our disposition of this matter, we need not review the trial court's determination of this preliminary issue.

[5] *Cohn* was decided on March 22, 1978. The trial court's orders dismissing plaintiff's complaint against Maren and Air Conveying were entered on June 20 and July 25, 1978, respectively. The *Hopkins* case was decided on December 18, 1978.

Appendix A

Defendants filed notices of appeal as of right;[6] Maren also petitioned this Court for certification, which was granted and merged with the appeals. 82 N.J. 288 (1980). We now affirm.

The effect of N.J.S.A. 2A:14-22 on corporate defendants was left unresolved by the Court in *Lemke* v. *Bailey, supra.* It has been the subject of lower court decisions with conflicting results. Compare *Cohn* v. *G.D. Searle & Co., supra,* with *Hopkins* v. *Kelsey-Hayes, Inc., supra; Whalen* v. *Young,* 28 N.J.Super. 543 (Law Div. 1953), rev'd on other grounds, 15 N.J. 321 (1954) (tolling provision applicable to unrepresented corporate defendant in motor vehicle cases despite availability of substituted service under N.J.S.A. 39:7-2), with *Ferraro* v. *Ferro Trucking Co., Inc.,* 72 N.J.Super. 519 (Law Div. 1962) (same circumstances—tolling provisions inapplicable). A resolution of this conflict first requires analysis of the statute's applicaiton to unrepresented foreign corporations that are amenable to long-arm service of process. Finding the provision applicable, we next consider the constitutionality of the statute as applied.

A

The New Jersey tolling statute, N.J.S.A. 2A:14-22, provides:

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom

[6] Motions for leave to appeal were also filed but were dismissed since the appealed judgment was final.

there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such a cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, *or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which* such person or surety is not residing within this state or *such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time which such an action is required to be commenced by the section.* The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation. [Emphasis supplied]

It is undisputed that neither Maren nor Air Conveying maintained an agent for service of process in New Jersey. A literal reading of the tolling statute's terms would unavoidably lead to the conclusion that the statutory period of limitations never commenced to run on plaintiff's claims. Defendants contend, however, that in light of the expansion of long-arm jurisdiction by state courts over nonresidents, we should construe the statute to provide that the period of limitations is tolled only when a foreign corporation cannot be served anywhere with process from a New Jersey court.

Appendix A

According to defendants the purpose of N.J.S.A. 2A:14-22 is to protect plaintiffs who might otherwise be barred from bringing their actions when certain classes of defendants are involved—essentially defendants who are not subject to the jurisdiction of New Jersey courts. They point to the amendment of the statute in 1949, L. 1949, c. 125, which excluded represented foreign corporations from its tolling effect. This amendment was enacted shortly after a statutory revision that provided acquisition of personal jurisdiction over foreign corporations by personal service within the State on an "officer, director, trustee or a managing or general agent of the corporation * * *." L. 1948, c. 356. Defendants contend that the legislative intent of the two provisions was to compel plaintiffs to institute their actions within the relevant limitations period provided they could obtain jurisdiction over and serve process on defendants. Since under present-day law defendants were amenable to "long-arm" service of process notwithstanding the absence of a representative in New Jersey, see R. 4:4-4(c)(1), defendants claim they are exempt from the tolling provision.

Under the defendants' approach the statutory phrase in N.J.S.A. 2A:14-22—"not represented in this state by any person or officer upon whom summons or other original process may be served"—would be interpreted as though it simply said, "not amenable to service." Thus, a standard involving representation would be transformed into one involving amenability to service. Because neither legislative history nor subsequent developments support this result, we reject defendants' argument and conclude that unrepresented, foreign corporations subject to long-arm service are not exempt from N.J.S.A. 2A:14-22.

Claims similar to defendants' were raised and rejected in *Lemke* v. *Bailey, supra.* In that case plaintiffs brought

suit against nonresidents for damages alleged to have resulted from an automobile accident in New Jersey. 41 N.J. at 297. Defendants argued that since they were amenable to service at all times following the accident by service on the New Jersey Director of Motor Vehicles, the tolling statute did not apply to them. The Court held that such amenability to service did not affect the statute's provision for tolling during nonresidence. *Id.* at 303.

While accepting *Lemke* as correctly decided, defendants here argue that the Appellate Division erred in finding *Lemke* controlling on the separate statutory issue now before us. They correctly note that the *Lemke* Court expressly declined to pass on the effect of the tolling provision on corporate defendants. See *id.* at 301. *Lemke* was concerned only with the effect of N.J.S.A. 39:7-2 on the tolling statute's coverage of individual defendants who were absent from the State. That provision made nonresident motorists amenable to substituted service upon New Jersey's Director of Motor Vehicles. Defendants further emphasize that the legislative history of N.J.S.A. 2A:14-22 more directly supported the conclusion that the tolling provision remained applicable despite the availability of substituted service. The Legislature had considered and passed but later recalled a proposed amendment to the statute exempting nonresident motorists subject to substituted service. The Court in *Lemke* held that legislative inaction in the face of judicial constructions confirmed that N.J.S.A. 39:7-2 did not affect the scope of the tolling provision in N.J.S.A. 2A:14-22. See 41 N.J. at 301.

Defendants contend that none of these factors supports an extension of the rationale in *Lemke*. Noting the absence of any legislative activity concerning the tolling stat-

ute's application to corporations, defendants contend that the presence of contradictory judicial determinations involving foreign corporate defendants, see *supra* at —— (slip op. at 6), renders legislative silence ambiguous.

Despite these asserted bases for distinction, we find the approach taken in *Lemke* applies with equal force to the effects of long-arm jurisdiction on the scope of N.J.S.A. 2A:14-22. As noted by the Court in *Lemke,* the origins of N.J.S.A. 2A:14-22 are traceable to 1820. See 41 N.J. at 298. In its original version New Jersey's tolling provision made on specific reference to corporations. See Pennington, *Laws of New Jersey,* 1703-1820 at 670 (1821). The statute remained essentially unchanged until 1949, at which time it provided:

> If any person against whom there is or may be a cause of action specified in sections 2:24-1, 2:24-2, 2:24-3, 2:24-5, 2:24-6; 2:24-16 or 2:24-17 of this title is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, the time or times during which such person is not residing within this state shall not be computed as a part of the periods of time within which such actions are required to be commenced by said sections; and the person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said sections, exclusive of such time or times of nonresidence, [R.S. 2:24-7]

In 1949 the tolling statute was amended and for the first time dealt specifically with the corporate defendant. The

amendment exempted from the statute domestic corporations and those foreign corporations maintaining representatives in New Jersey. It thereby extended the benefits of the State's statutes of limitations to those classes of defendants. As amended in 1949, the statute provided as follows:

> If any person against whom there is or may be a cause of action specified in sections 2:24-1, 2:24-2, 2:24-3, 2:24-5, 2:24-6, 2:24-16 or 2:24-17 of this Title is not a resident of this State when such a cause of of action accrues, or removes from this State after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation not organized under the laws of this State, against whom there is or may be such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person is not residing within this State or such corporation is not so represented within this State shall not be computed as part of the periods of time within which such actions are required to be commenced by said sections; and the person entitled to any such action may commence the same after the accrual of the cause therefor, within the periods of time limited therefor by said sections, exclusive of such time or times of nonresidence or nonrepresentation. [L. 1949, c. 125]

The statement accompanying the bill read as follows:

> Foreign corporations licensed to do business in New Jersey are now deprived by judicial construction of

> the benefit of the statute of limitations. The purpose of this bill is to correct that situation. New York State found it necessary to make a similar change in its laws in view of recent court decisions.
>
> [*Statement Accompanying Assembly No. 467* (1949)][7]

As noted above, defendants argue that the intent of the 1949 amendment was to exempt from the tolling provisions corporate defendants amenable to service of process. The fact that the words employed by the Legislature do not mirror this intention is not considered conclusive by defendants. They assert that the present reach of a State court's jurisdictional powers could not have been anticipated when the amendement was drafted. As evidence of this, they note that New Jersey's rule for long-arm service was not passed until 1958, R.R. 4:4-4(d) (effective September 3, 1958) (presently R. 4:4-4(c)(1)), and that it was not until 1971 that this Court recognized that the long-arm rule allows out-of-state service to the "uttermost limits permitted by the United States Constitution," *Avdel Corp.* v. *Mecure*, 58 N.J. 264, 268 (1971).

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[7] At the time of this amendment, New York's tolling statute was Section 19 of the Civil Practice Act, which had been amended in 1943 to include an exception from the tolling statute for individuals or corporations with a designated agent for service of process within New York and for foreign corporations with "one or more officers or other persons in the state on whom a summons for such corporation may be served." (1943 N.Y. Laws, ch. 263. The current version of New York's tolling statute, N.Y. Civ. Prac. Law §207, specifically provides that it does not apply "while jurisdiction over the person of the defendant can be obtained without personal delivery of the summons to him within the state." 1962 N.Y. Laws, ch. 308, N.Y. Civ. Prac. Law §207(3) (McKinney 1972).

Defendant's position is unconvincing. It would require us to incorporate into the tolling statute changes in another area of the law which were made after its passage. While courts of other states have construed tolling statutes to be inapplicable to foreign corporations subject to long-arm service, the statutes involved were phrased in terms of "absence" from the state—general language which more readily lends itself to flexible interpretation.[8] See, *e.g., Dedmon* v. *Falls Products, Inc.*, 299 F.2d 173 (5th Cir. 1962) (Alabama law); *Partis* v. *Miller Equipment Co.*, 324 F.Supp. 898 (N.D. Ohio 1970), aff'd, 439 F.2d 262 (6th Cir. 1971); *Phillips* v. *Anchor Hocking Glass Corp.*, 413 P.2d 732 (Ariz. Sup. Ct. 1966); *Lipe* v. *Javelin Tire Co., Inc.*, 536 P.2d 291 (Idaho Sup. Ct. 1975).[9] The New Jersey statute, however, is very narrowly drawn. It speaks not of presence or absence but of *representation* within the State. Such language must be interpreted from the intent of the Legislature in light of circumstances at the time of enactment. 2A Sutherland, *Statutory Construction* §49.02 (4th Ed. 1973); see *Fidelity Deposit Co. of Maryland* v. *Abagnale*, 97 N.J.Super. 132, 143-144 (Law Div. 1967). As defendants themselves recognize, the circum-

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[8] For this reason, my Brother Sullivan's observation that our holding "places this Court with a minority of jurisdictions," *post* at — (slip op. at 2), is misleading. Our result today differs from those of other courts because of a difference in statutory language, not a defect in reasoning. Without describing and comparing the various tolling statutes that have been interpreted, any reference to "majority" and "minority" rules is meaningless.

[9] In some cases state legislative action has made clear that tolling shall not occur when a defendant is amenable to service outside the state. See, *e.g.*, Ill. Ann. Stat. ch. 83 §19 (Smith-Hurd 1979); N.Y. Civ. Prac. Law §207 (McKinney 1972).

stances prevailing at the time of the 1949 amendment did not include long-arm service on foreign corporations. *We cannot accept the invitation to adopt this latter development as the premise for ignoring clear and unambiguous statutory language.*

Defendant Air Conveying argues in the alternative that New Jersey's long-arm rule created a new class of corporate defendants not covered by N.J.S.A. 2A:14-22. There is no merit to this contention. The tolling statute originally applied to all foreign corporations. See *Cramer* v. *Borden's Farm Products Co., Inc.*, 58 F.2d 1028 (S.D.N.Y. 1932) (under New Jersey law New York corporation licensed to do business in New Jersey not resident of New Jersey and therefore is within the scope of tolling statute). It was not until 1949 that any foreign corporations became exempt from its effects. See *Statement Accompanying Assembly No. 52* (1948). By design, therefore, the statute includes all corporations not specifically exempted by amendment. In effect, Air Conveying argues that a Rule of Court can act as an implied, partial repeal of a legislative enactment. This is beyond the power of the Judiciary. See *New Jersey Chamber of Commerce* v. *New Jersey Election Law Enforcement Commission*, 82 N.J. 57, —— (1980).

It is significant to note that the 1949 amendment was enacted four years after the landmark case of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). There the United States Supreme Court held that a state's jurisdictional powers extended beyond its borders to reach parties who have had "certain minimum contacts" with the state "such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice.'" *Id.* at 316 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463

(1940)). The Legislature must be presumed to have been aware of this development when it acted to remove only represented corporations from the tolling provisions of N.J.S.A. 2A:14-22. In the absence of legislative action expressly incorporating amenability to long-arm service as an exemption from the tolling statue, that class of foreign corporations remains subject to its effect.[10]

This conclusion is in accord with the results we have reached in developing a *"common law of limitations." Galligan* v. *Westfield Centre Service, Inc.*, 82 N.J. 188, 191 (1980). We have consistently endeavored, where in keeping with the underlying purposes of statutes of limitations, to preserve a plaintiff's opportunity to have his claim adjudicated on the merits. See, *e.g., Galligan*, 82 N.J. at 193; *Kaczmarek* v. *New Jersey Turnike Auth.*, 77 N.J. 329, 338 (1978); *White* v. *Violent Crimes Compensation Board*, 76 N.J. 368, 379 (1978). In this case defendant argues that denying plaintiff such an opportunity is consonant with the underlying purposes of the tolling statute.

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[10] We note that whatever hardship on foreign corporations might be caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the State. Contrary to defendants' and our Brother Sullivan's contentions, see *post* at — (slip op. at 1-2), the length of a defendant's exposure to suit without such an agent will not be determined solely by a plaintiff's convenience. If a plaintiff's delay is *inexcusable* and has resulted in *prejudice* to the defendant, the latter may raise the equitable defense of *laches* to bar the claim. See *West Jersey Title & Guaranty Co.* v. *Industrial Trust Co.*, 27 N.J. 144 (1958); *Pavlicka* v. *Pavlicka*, 84 N.J. Super, 357 (App.Div. 1964); *Pfeffer* v. *Delran Tp.*, 159 N.J. Super. 497 (Law Div. 1978). Since this appeal comes to us after a grant of summary judgment, we have no opportunity to assess the merits of that defense here.

Not only do defendants misconstrue those purposes, but the approach they advocate is contrary to the "'just accommodation' of individual justice and public policy," *Galligan*, 82 N.J. at 192-193 (quoting *Lopez* v. *Swyer*, 62 N.J. 267, 274 (1973)), which seeks to avoid "obvious and unnecessary harm [to] individual plaintiffs." *Id.* at 192; see, *e.g.*, *Fox* v. *Passaic General Hosp.*, 71 N.J. 122, 125-126 (1976); *Kyle* v. *Green Acres at Verona, Inc.*, 44 N.J. 100, 109 (1965).[11]

B

Turning to defendants' constitutional claims, we find them similarly unpersuasive.[12]

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[11] Our Brother Sullivan's reliance on *Galligan* and *White* is therefore misplaced. Neither case dealt with the tolling provision at issue here. In rejecting the "harsh approach of literally applying the statute of limitations," *Galligan*, 82 N.J. at 192 (quoting *Kyle*, 44 N.J. at 109), the Court in those cases avoided the infliction of unnecessary harm on plaintiffs. See *Galligan*, 82 N.J. at 192-193; *White*, 76 N.J. at 379. We do the same here by refusing to deny plaintiffs the benefit of a *tolling* statute to which they are clearly entitled. Justice Sullivan's approach would have us avoid rigid language for the purpose of barring plaintiff's assertion of his claim—a result directly contrary to that reached in *Galligan* and *White*, which the dissent has cited for its support. *Post* at — (slip op. at 3).

[12] Defendants base their claims of unconstitutionality on the Fourteenth Amendment to the Federal Constitution. We note, however, that our analysis would be identical if the challenges had been based on State constitutional grounds. See *Taxpayer's Ass'n of Weymouth Tp.*, 80 N.J. 6, 42-44 (1976), app. dism. and *cert.* den. *sub nom. Feldman* v. *Weymouth Tp.*, 430 U.S. 977 (1977).

Appendix A

Equal Protection

Defendants do not contend that the classification employed in N.J.S.A. 2A:14-22 implicates any fundamental interest or "suspect class." Rather they assert that a distinction between foreign corporations represented within the State and those unrepresented but amenable to long-arm service lacks any rational relation to the governmental objective sought to be advanced by the tolling statute. Their argument is that the continued expansion of extra-territorial jurisdiction has undermined the rationality of distinguishing between foreign corporations represented in New Jersey and unrepresented foreign corporations that are amenable to long-arm service outside the State. Defendants therefore challenge as irrational the tolling statute's application to the latter.

The Court in *Lemke* rejected a similar constitutional challenge to the statute's distinction between resident and non-resident motorists. See 41 N.J. at 302-303. Although the issue there decided is not identical to that now before us, the principles on which the Court relied continue to provide the proper framework for analysis.[13] They support a finding of constitutionality.

Legislative enactments are presumed to be valid and the burden on the proponent of invalidity is a heavy one. *E.g.*,

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[13] Defendants again attempt to negate the precedential value of the *Lemke* case. They reiterate the distinctions discussed *supra* at — (slip op. at 10-11), and rely heavily on the fact that defendants in *Lemke* conceded there was a rational basis for establishing resident and nonresident classes. See 41 N.J. at 302. We agree with Appellate Division that such an admission is "hardly any basis for detracting from the court's decision that the application of the tolling statute was constitutional." 168 N.J. Super. at 526.

Hutton Park Gardens v. *West Orange Town Council*, 68 N.J. 543, 564-565 (1975). The challenger must demonstrate that the classification lacks a rational basis in relation to the object of the legislation. *E.g., Dome Realty, Inc.* v. *City of Paterson*, —— N.J. ——, —— (1980) (slip op. at 43); *State* v. *CIB Int'l*, —— N.J. ——, —— (1980) (slip op. at 15); *Salorio* v. *Glaser*, —— N.J. ——, —— (1980) (slip op .at 40); *Taxpayers' Ass'n of Weymouth Tp.* v. *Weymouth Tp.*, 80 N.J. 6, 40 (1976), app. dism. and *cert.* den. *sub nom. Feldman* v. *Weymouth Tp.*, 430 U.S. 977 (1977). Even if the original, stated purpose of an enactment refers to conditions that no longer exist, a classification survives this minimal constitutional scrutiny as long as it possesses a conceivable rational basis in present-day cirmumstances. *McKenney* v. *Byrne*, 82 N.J. 304, 317-318 (1980).

The flaw in defendants' argument is that it recognizes as rational only a distinction based on the impossibility of obtaining jurisdiction over a foreign corporation. It refuses to acknowledge that among amenable foreign corporations there are degrees of difficulty in effecting service. *A recognition of these degrees of difficulty supplies a present rational basis for distinguishing between represented corporations and those unrepresented but amenable to long-arm service.*

The purpose of the statute is not confined to providing relief when service is impossible. Even where absent residents could be served outside the State, the statute still provides for tolling. See *Fidelity Deposit Co. of Maryland* v. *Abagnale*, 97 N.J.Super. at 143-144. There is a conceivable rational basis to support tolling.

> [T]he view might have prevailed that the facility of extra-territorial service did not meet the hardship

> of locating a departed resident in the sprawling country beyond New Jersey's borders. [Id. at 144]

In the 1949 amendment, the Legislature re-expressed its purpose with regard to corporations. It withdrew some of the protection it had afforded plaintiffs suing foreign corporations. Corporations represented in New Jersey, like New Jersey residents present within the State, were made except from the statute's tolling effects. However, plaintiffs were still not required to search for defendants outside the jurisdiction and succeed within a definite period of time. Thus, the amendment struck a balance between protecting plaintiffs with claims against foreign corporate defendants and imposing excessive exposure to suit upon those defendants that were represented within the State. We agree with plaintiffs that the availability of long-arm service has not destroyed the rationality of the classification used in striking this balance.

As the Appellate Division correctly observed, the reasonable basis for the distinction "is demonstrated merely by a reading of our rules pertaining to service of process," 168 N.J.Super. at 527. Rule 4:4-4(c)(1) provides that service may be made

> [u]pon a domestic or foreign corporation, by serving, * * * either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place

> of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. *If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing* and if the corporation, then, consistent with due processt of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office. [R. 4:4-4(c)(1) (emphasis added)]

Under our rules, extra-territorial service is not simply an alternative to service within the State. Plaintiffs may not resort to out-of-state service unless proper efforts to effect service in New Jersey have failed. The rule imposes a furter burden on a plaintiff by requiring him to gather sufficient information to satisfy a court that service is "consistent with due process of law." Since long-arm service is more burdensome than service within the State, a rational distinction exists between corporations that are amenable to service within the State and those that are not. This distinction supports the tolling statute's application to corporations which cannot be served with process within New Jersey. Accordingly, the statute passes constitutional muster.

Due Process

For the first time on appeal defendant Maren also claims that the statute violates the Federal Due Process Clause.

Appendix A

The same obstacles which defendants failed to overcome in asserting their equal protection claim block their path here as well.

The constitutional guarantee of substantive due process requires only that the operation of a statute not be unreasonable, arbitrary or capricious, and that the means selected bear a rational relationship to a permissible legislative purpose. *Dome Realty, Inc.* v. *City of Patterson,* —— N.J. at —— (slip op. at 30); *Orange Taxpayers Council, Inc.* v. *City of Orange,* —— N.J. ——, —— (1980) (slip op. at 12-13); *Weymouth,* 80 N.J. at 44.

In this case defendants' due process claim is "little more than a restatement of the contention that [the statute] contravene[s] principles of equal protection." *Weymouth,* 80 N.J. at 45. In providing for tolling of the statute of limitations under certain circumstances—absence of a resident, nonresidence in the case of an individual and nonrepresentation in the case of a corporation—the statute is substantially tailored to protect a plaintiff's cause of action when service of process on a defendant is most likely to present difficulties.

Conclusion

For the foregoing reasons the judgment of the Appellate Division is affirmed.

Chief Justice Wilentz and Associates Justices Clifford, Schreiber and Pollock join in this opinion.

Justice Sullivan has filed a separate dissenting opinion in which Justice Handler joins.

Appendix A

SUPREME COURT OF NEW JERSEY

A-72/143 SEPTEMBER TERM 1979

KONSTANTINOS VELMOHOS, also known as VELMOHOS KONSTANTINOS,

Plaintiff-Respondent

v.

MAREN ENGINEERING CORPORATION, an Illinois corporation, and AIR CONVEYING, INC., an Illinois corporation,

Defendants-Appellants,

and

NADUSTCO, INC., a Louisiana corporation,

Defendant.

SULLIVAN, J., dissenting.

I would construe N.J.S.A. 2A:14-22 to toll the statute of limitations as to a foreign corporation against which there is a cause of action in this State only in a situation where such corporation is not amenable to personal jurisdiction.

Defendant corporations were subject to long-arm jurisdiction in this State at all relevant times as found by the trial court. See R. 4:4-4(c)(1). Indeed, service was made upon them pursuant to the rule. To hold that despite this,

a plaintiff can sit back for any number of years and file suit at his pleasure against such foreign corporations, is to do violence to the concept of limitations of actions. The construction placed upon N.J.S.A. 2A:14-22 by the majority opinion, while following the literal language of the statute, frustrates the very purpose of the tolling provision and places this Court with a minority of jurisdictions. See Annotation, "*Tolling of statute of limitations during absence from state as affected by fact that party claiming benefit or limitations remained subject to service during absence of nonresidence*," 55 A.L.R. 3d 1158 (1974). As noted in the annotation, a majority of courts have refused to give application to tolling provisions when the party claiming the benefit of limitations has remained amenable to personal jurisdiction.

A recent comment in 10 *Seton Hall L. Rev.* 585 (1980) entitled "The Tolling Provision of the Statute of Limitations—a Haven for the Dilatory Plaintiff," makes a critical analysis of N.J.S.A. 2A:14-22 and the position now taken in the majority opinion and rejects it on constructional as well as constitutional grounds. The comment concludes by stating that "[a] statute that servies to placate the dilatory plaintiff while denying an important right to a nonresident defendant is an anomaly in a jurisdiction noted for progressive developments in the law corresponding to the changes in the circumstances to which the law applies." *Id.* at 613. Despite the rigidity of some tolling and limitations statutory provisions, this Court has always construed them to effectuate the true statutory purpose. See, *e.g.*, *Galligan* v. *Westfield Centre Service, Inc.*, 82 N. J. 188 (1980); *White* v. *Violent Crimes Compensation Board*, 76 N. J. 368 (1978). It has not done so today.

Appendix A

Although I find it unnecessary to reach the issue, the statutory construction of N.J.S.A. 2A:14-22 adopted by the majority also raises substantial questions of due process and equal protection of the laws. I would reverse the Appellate Division and reinstate the judgment of the trial court dismissing the complaint.

Justice Handler joins in this dissent.

APPENDIX B

Opinion of the Superior Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-5075-77

KONSTANTINOS VELMOHOS, also known as VELMOHOS KONSTANTINOS,

Plaintiff-Apellant,

v.

MAREN ENGINEERING CORPORATION, an Illinois corporation, and AIR CONVEYING, INC., an Illinois corporation,

Defendants-Respondents,

and

NADUSTCO, INC., a Louisiana corporation,

Defendant.

Argued: May 8, 1979—Decided: May 29, 1979.

Before Judges Lynch, Crane and Horn.

Appendix B

On Appeal from Superior Court, Law Division, Middlesex County.

Mr. Barry A. Weisberg argued the cause for appellant (Mr. Edward J. Dolan, attorney).

Mr. William K. Lewis argued the cause for respondent Maren Engineering Corporation (Messrs. Shanley & Fisher, attorneys).

Mr. Joseph DiRienzo argued the cause for respondent Air Conveying, Inc.

The opinion of the court was delivered by
HORN, J.A.D.

This case raises for the first time in our state courts the question of the constitutionality of the tolling provision of our statute of limitations, N.J.S.A. 2A:14-22, as applied to a cause of action against an unrepresented foreign corporation constitutionally amenable to long-arm service of process under R. 4:4-4(c)(1). The trial judge held that the tolling statute was unconstitutional as so applied. Plaintiff appealed.[1]

On June 4, 1976 plaintiff filed a complaint claiming damages for personal injuries sustained by him on August 3, 1973 as the result of a defective machine or equipment supplied by defendant Maren Engineering Corporation (Maren), an Illinois corporation. Subsequently plaintiff filed an amended complaint adding as a defendant Air Conveying, Inc., also an Illinois corporation, which along with

[1] The Attorney General was notified of the constitutional issue's being before this court, pursuant to R. 4:28-4. He has not appeared.

Maren was claimed to have supplied the defective machine or equipment which allegedly caused injury to plaintiff.[2]

Claims for personal injuries are usually barred if an action is not brought within two years of the date of the accrual of the cause of action. N.J.S.A. 2A:14-2. N.J.S.A. 2A:14-22 provides that said two-year time limitation as well as time limitations fixed by several other statutes shall be tolled as follows:

> * * * [I]f any corporation * * * not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues * * *, the time or times during which such corporation is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced * * *.

There appears to be no dispute as to the facts that both defendants on this appeal were incorporated in Illinois, that neither was registered to do business in New Jersey and that each was constitutionally amenable to long-arm service in an action in the State by reason of their contacts herein.

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[2] Another corporation and another entity were named as defendants in the complaint and amended complaint. We have omitted reference to them because they have since been dismissed as parties, and discussion as to their respective roles in the litigation would be superfluous. Only Maren and Air Conveying, Inc. are included in the designation of "defendant" herein.

Appendix B

Each defendant successfully moved for dismissal of the complaint on the ground that the statute of limitations, N.J.S.A. 2A:14-2, barred the action. These motions probably were provoked by the publication of *Cohn* v. *G. D. Searle & Co.*, 447 F. Supp. 903 (D.N.J. 1978), in which the judge held that our tolling statute, N.J.S.A. 2A:14-22, violated the Equal Protection Clause of the United States Constitution[3] as applied to foreign corporations which, although "not represented in this state by any person or officer upon whom summons or other original process may be served,"[4] could still be served under the long-arm rule.

The trial judge adopted the reasoning and rule thus declared in *Cohn*, apparently on the thesis that "• • • since [*Cohn*] • • • involved a federal constitutional question decided by a federal court, I feel I am enjoined to follow [the] decision." The judge additionally expressed his view that the position of the court in that case was reasonable.

Quite properly, neither defendant claims that the decision in *Cohn* is controlling. It is well established that state courts and lower federal courts occupy parallel positions, even on federal constitutional questions. *State* v. *Norflett*, 67 N.J. 268, 286 (1975); *State* v. *Coleman*, 46 N.J. 16, 36 (1965), *cert.* den. 383 U.S. 950 (1966).

The heart of the holding of *Cohn* that the Equal Protection Clause was violated is expressed as follows:

> The effect of the foreign corporation section of the tolling statute is to distinguish between domestic and

[3] U.S.C.A., Const. Amend. 14.

[4] N.J.S.A. 2A:14-22.

> foreign corporations subject to service through representative agents within the state and foreign corporations subject to service under the long-arm rule. The former are entitled to plead the statute of limitations while the latter are denied its repose. Since this difference in treatment bears no rational relationship to the object of the tolling statute, I find that the statute denied equal protection to foreign corporations amenable to long-arm jurisdiction *Cf. Lemke* v. *Bailey, supra* 41 N.J. at 305-06, 196 A.2d 523 (Schettino, J., dissenting). [447 F.Supp. at 912]

Whatever may be the standard elsewhere, this court is bound by the rules laid down by our Supreme Court. *Kazin* v. *Kazin*, 161 N.J. Super. 174, 182-183 (App.Div. 1978); *State* v. *Moore*, 147 N.J. Super. 490, 497 (App.Div. 1977), certif. den. 74 N.J. 272 (1977). We can perceive no sound basis for distinguishing the precedent laid down in *Lemke* v. *Bailey*, 41 N.J. 295 (1963), so as to arrive at the conclusion reached in *Cohn*. To the contrary, although we may recognize that perhaps in the interest of advancing the very purposes of statutes against repose the holding of *Cohn* should be adopted,[4] that is a matter of policy which our Court in *Lemke* must have considered. In any event, if the policy is to be changed, that Court must change it. *Franco* v. *Davis*, 51 N.J. 237 (1968).

As already noted, Lemke is controlling, notwithstanding the fact there was one dissent, as noted in *Cohn*. In *Lemke* plaintiffs, residents of New Jersey, instituted an action in the Law Division of the Superior Court seeking recovery of damages allegedly arising from an automobile collision

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[4] The reasons for this as stated in *Cohn* are persuasive.

which occurred in this State. Service was effected on defendants, residents of Connecticut, by serving the Director of Motor Vehicles, pursuant to N.J.S.A. 39:7-2. Since the accident out of which the claims had arisen had occurred over two years before the action was filed, defendants pleaded the applicable statute, N.J.S.A. 2A:14-2.

As in the instant case, defendants in *Lemke* argued that, since they were continuously amenable to service for two years after the accrual date of the cause of action by service upon the Director of Motor Vehicles, the tolling statute, N.J.S.A. 2A:14-22, was inapplicable, and that a contrary decision would deprive them of the equal protection of the law and hence be unconstitutional. After reviewing the legislative history of the tolling statute, N.J.S.A. 2A:14-22, the Court concluded that the legislative intent as enunciated in *Gotheiner* v. *Lenihan,* 20 N.J. Misc. 119 (Sup.Ct. 1942), was that "the fact service could be made on nonresident defendants under N.J.S.A. 39:7-2 within the statutory time limit, did not make inapplicable * * * N.J.S.A. 2A:14-22 * * *." *Lemke, supra,* 41 N.J. at 300.

It further concluded as to the constitutional argument that defendants were not denied the equal protection of the law. In doing so the Court referred to the opinion of the late Chief Justice Weintraub in *New Jersey Restaurant Ass'n* v. *Holderman,* 24 N.J. 295 (1957), which considered in depth the problem of determining whether unequal protection exists.

Defendants would diminish and distinguish the constitutional holding of *Lemke* by observing that in that case the defendants admitted that the provisions of N.J.S.A. 2A:14-22, creating two classes of defendants under the statute of limitations, *i.e.,* resident and nonresident, were

constitutional. This admission is hardly any basis for detracting from the Court's decision that the application of the tolling statute was constitutional. Nor can defendants draw any sound basis for distinction simply because the Court in noting the contradictory results of *Whalen* v. *Young*, 28 N.J. Super. 543 (Law Div. 1953), rev. on other grds., 15 N.J. 321 (1954), and *Ferraro* v. *Ferro Trucking Co.*, 72 N.J. Super. 519 (Law Div. 1962), said that it expressed no opinion as to the effect of the tolling statute upon a corporate defendant.[5] In our view the holding of constitutionality established the principle that there was no unequal protection simply because the nonresident, individual or corporate, could have been served with process.

We are not satisfied as to the correctness of the conclusion reached in *Cohn* that "there is no rational justification for differential treatment of such defendants with regard to the statute of limitations." 447 F.Supp. at 912.

More recently, *Hopkins* v. *Kelsey-Hayes, Inc.*, 463 F. Supp. 539 (D.N.J. 1978), a case involving the same constitutional issue, refused to follow *Cohn*. Judge Brotman, in *Hopkins*, saw the holding in *Cohn* as merely "a substitution of [that] court's judgment on the policies beind the tolling statute for that of the [L]egislature." 463 F.Supp. at 542.

Independently, we assess the constitutionality of the applicability of the tolling statute, N.J.S.A. 2A:14-22, under the Equal Protection Clause and find no infirmity. Certainly defendants have not borne the burden of demon-

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[5] See *Lackovic* v. *New England Paper Tube Co., Inc.*, 127 N.J. Super. 394, 398 (Law Div. 1974), where the judge noted that there was no logical reason to treat corporate and individual defendants in a different manner.

strating the contrary. *New Jersey Restaurant Ass'n* v. *Holderman, supra* at 300.

The Equal Protection Clause does not prohibit mere inequality or difference in treatment. *Dandridge* v. *Williams,* 397 U.S. 471 (1970). And a classification must be upheld under any reasonable set of facts unless there is a showing of invidious discrimination. *Morey* v. *Doud,* 354 U.S. 457, 463 (1957); *Kenny* v. *Byrne,* 144 N.J. Super. 243 (App.Div. 1976). If a classification has some "reasonable basis," it does not offend the Constitution simply because it is not made with mathematical nicety or because in practices it results in some inequality. *Lindsley* v. *Natural Carbonic Gas Company,* 220 U.S. 61 (1910).

There is a reasonable basis for a distinction between the application of the toling statute as to foreign corporations represented in this State and as to those not so represented. This is demonstrated merely by a reading of our rules pertaining to service of process. R. 4:4-4(c)(1) provides for service:

> Upon a domestic or foreign corporation, by serving, * * * either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within the State acting in the discharge of his duties. If it appears by affidavit of plaintiff's attorney or of any person having knowl-

> edge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

Service upon a represented foreign corporation is comparably easy. Service upon an unrepresented foreign corporation may or may not be accomplished with the same facility. It will be noted that before a foreign corporation, otherwise qualified to be served "consistent with due process of law" may be served through the "long-arm" method it must appear by affidavit of someone having "knowledge of the facts that after diligent inquiry and effort personal service cannot be made." Quite obviously, the problem of serving a foreign unrepresented corporate defendant presents problems which ordinarily are not encountered in serving local corporate defendants. And what is not stated expressly in the foregoing rule but is nonetheless a required condition precedent to valid long-arm service is that there must be proof that such corporations have such minimal contacts as will not offend traditional notions of fair play and substantial justice. *International Shoe Co.* v. *State of Washington,* 326 U.S. 310 (1945); *Avdel Corporation* v. *Mecure,* 58 N.J. 264 (1971).

The differences in the methods of serving domestic corporations and unrepresented foreign corporations (where service may be attained) furnish the rational basis for a constitutional distinction in the application of the tolling statute. Service upon an unrepresented foreign corpora-

tion may be more difficult. This is demonstrated in the instant case. The seventh separate defense of Maren's answer to plaintiff's complaint asserted that process and service thereof "are insufficient because the Summons and Complaint were not accompanied by an affidavit stating diligent effort and inquiry to effect personal service, as required by R. 4:4-4(c)(1)."

Finding as we do in this case that the application of the tolling statute, N.J.S.A. 2A:14-22, did not offend the Equal Protection Clause, the judgment entered in the trial court is

REVERSED.

APPENDIX C

Order of Summary Judgment of the Trial Court

(Filed—June 28, 1978)

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—MIDDLESEX COUNTY

DOCKET NO. L-38515-75

CIVIL ACTION

KONSTANTINOS VELMOHOS, a/k/a
VELMOHOS KONSTANTINOS,

Plaintiff,

vs.

MAREN ENGINEERING CORPORATION,
an Illinois corporation, *et al.*,

Defendants.

This matter having been opened to the Court by Shanley & Fisher, attorneys for defendant, Maren Engineering Corporation (William K. Lewis, Esq. appearing) on the Motion for the entry of an Order dismissing the Complaint against it, with prejudice, as barred by the Statute of Limitations; said motion having been brought in the presence of counsel for defendants, Air Conveying Cor-

poration (Joseph DiRienzo, Esq. appearing) and Nadustco, Inc. (Bernard Leroe, Esq. appearing) and the attorney for plaintiff (Barry A. Weisberg, Esq. appearing), and the Court having considered the Briefs and Affidavits and having heard the argument of counsel at hearings conducted on May 11, 1978 and June 9, 1978, and good cause being shown;

It is on this 20th day of June 1978,

Ordered that the motion of defendant, Maren Engineering Corporation, for the entry of an Order dismissing the Complaint against it, with prejudice, be and the same is hereby granted, and it is further,

Ordered that a copy of the within Order be forwarded to all counsel within 7 days of the date hereof.

C. John Stroumtsos, J.S.C.

APPENDIX D

Order of the Supreme Court of New Jersey Denying Petition for Rehearing

(Filed—July 23, 1980)

SUPREME COURT OF NEW JERSEY,

M-1137 SEPTEMBER TERM 1979

KONSTANTINOS VELMOHOS, a/k/a
VELMOHOS KONSTANTINOS,

Plaintiff-Respondent,

vs.

NADUSTCO, INC., *etc.*,

Defendant,

and

MARAN ENGINEERING CORP.,

Defendant-Movant.

No member of the Court who voted with the majority having moved the petition for rehearing is dismissed as moot.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 21st day of July, 1980.

STEPHEN W. TOWNSEND
Clerk

APPENDIX E

Notice of Appeal and Affidavit of Service

IN THE

SUPREME COURT OF NEW JERSEY

NEW JERSEY SUPREME COURT DOCKET NO. 16,183

(A-5075-77)

MAREN ENGINEERING CORP.,

Appellant,

vs.

KONSTANTIN VELMOHOS,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Maren Engineering Corp., the above-named appellant, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of New Jersey, affirming the tolling of the Statute of Limitations for out-of-state defendants, entered in action Docketed as No. 16,183 (A-5075-77) on June 18, 1980. The New Jersey Supreme Court denied Maren's application for a rehearing on July 21, 1980.

Appendix E

This appeal is being taken pursuant to 28 U.S.C. §1257 (2).

SHANLEY & FISHER
550 Broad Street
Newark, New Jersey 07102
(201) 643-1220
Attorneys for Appellant
Maren Engineering Corp.
By: RICHARD E. BRENNAN

Dated: October 8, 1980

AFFIDIVIT OF SERVICE

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

MOLLY B. CANNON, of full age, being duy sworn according to law, upon her oath deposes and says:

1. I am an attorney-at-law of the State of New Jersey and am associated with the law firm of Shanley & Fisher, Esqs., attorneys for appellant, Maren Engineering Corp.

2. On October 9, 1980, I served a copy of the within Notice of Appeal to the Supreme Court of the United States upon the Clerk of the Supreme Court of New Jersey and the Clerk of the Superior Court of New Jersey-Appellate Division by having same hand deivered to them. I also served on October 9, 1980, a copy of this Notice of Appeal to the Supreme Court of the United States upon all coun-

sel of record by mailing same to them by Certified Mail, return receipt requested.

MOLLY B. CANNON

Sworn and subscribed
to before me this 9th
day of October, 1980.
PATRICIA J. COONEY
Attorney-at-Law of the
State of New Jersey

APPENDIX F

Opinion of the United States Court of Appeals for the Third Circuit

(Filed: July 23, 1980)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1881

ROY HOPKINS,

Appellee,

v.

KELSEY-HAYES, INC.,

Appellant.

Nos. 79-2406 and 79-2605

SUSAN COHN and WALTER COHN, her husband,

Appellants in No. 79-2406,
Cross-Appellee in No. 79-2405,

v.

G. D. SEARLE & COMPANY,

Appellee in No. 79-2406,
Cross-Appellant in No. 79-2405.

Appendix F

APPEALS FROM THE UNITED STATES DISTRICT COURT
FJR THE DISTRICT OF NEW JERSEY

D.C. Civil Nos. 78-1646 and 74-0450)

Argued: February 11, 1980.

Before: ADAMS, GARTH and VAN DUSEN, Circuit Judges.

APELL, HOWARD AND MATHEWS
J. LLEWELLYN MATHEWS (Argued)
P.O. Box 95
Browns Mills, N.J. 08015

Attorneys for Appellee (79-1881)

SHANLEY & FISHER
RAYMOND M. TIERNEY, JR., (Argued)
ABBOTT S BROWN
550 Broad Street
Newark, N.J. 07102

Attorneys for Appellee,
Cross-Appellant (79-2406 and 2605)

RAWLE & HENDERSON
LOWELL A. REED, JR. (Argued)
2100 Packard Building
Philadelphia, PA 19102

Attorneys for Appellant (79-1881)

Appendix F

WALTER R. COHN, (Argued)
ELAINE HARRIS
15 Valley Street
South Orange, N.J. 07079

Attorneys for Appellants
(79-2406 and 2605)

OPINION OF THE COURT

GARTH, *Circuit Judge.*

These appeals[1] present up with constitutional challenges to a New Jersey statute, N.J.S.A. §2A:14-22, which tolls the statute of limitations in actions against foreign corporations which are not represented in New Jersey, but which may nonetheless be amenable to New Jersey's long-arm jurisdiction. By contrast, foreign corporations which are represented in New Jersey receive the full benefit of all limitations statutes. Thus, the defendants here, both non-represented foreign corporations, claim that N.J.S.A. §2A:14-22, by refusing them the protection of the limitation statute, has denied them due process and equal protection of the laws under the United States constitution.

We do not agree, as we conclude that the New Jersey statute is not irrational. Thus, we will not disturb New Jersey's legislative enactment, which we hold satisfies constitutional standards.

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[1] Although these cases were tried separately before two different district court judges, because they involve identical challenges to the constitutionality of a New Jersey statute, N.J.S.A. §2A:14-22, we consolidated them for the purpose of oral argument and disposition.

Appendix F

I.

A.

In the first of these appeals, *Cohn* v. *D. D. Searle & Co.*, the plaintiffs, who are husband and wife, sued G. D. Searle & Co. (herinafter "Searle") in tort for damages caused by a birth control pill, Enovid, which had been manufactured by Searle and which allegedly contributed to a stroke suffered by Mrs. Cohn. Searle is a Delaware corporation with its principal place of business in Illinois. Although it was at all times subject to New Jersey's long-arm jurisdiction, *see* N.J. Ct. R. 4:4-4(c)(1),[2] Searle was not registered to do business in New Jersey, and it maintained no agent for service of process in New Jersey. In fact, the only personnel affiliated with Searle who were located in New Jersey, during the time period relevant to this litigation, were 40 so-called "detail-persons" who worked out of their own homes and whose sole function was to generate good-will for Searle among New Jersey doctors.

Before trial, Searle claimed the benefit of New Jersey's two year statute of limitations as a defense. N.J.S.A. §2A:

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[2] Rule 4:4-4(c)(1) permits long-arm service upon out-of-state corporations in the following circumstance:

> If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing [methods for service within the state] and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

14-2[3] In response, the plaintiff claimed that the statute of limitations was no bar to their complaint because N.J.S.A. §2A:14-22 (hereinafter the "tolling provision") tolls the limitations statute in any action against a foreign corporation which "is not represented in this state by any person or officer upon whom summons or other original process may be served. . . ."[4]

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[3] N.J.S.A. §2A:14-2 provides:

> Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

[4] N.J.S.A. §2A:14-22 provides in relevant part:

> If any person against whom there is any of the causes of action specified . . . is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, *or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served,* when such cause of action accrues or at any time before the expiration of the times so limited, *the time or times during which* such person or surety is not residing within this state or *such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section.* The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or

(Footnote continued on following page)

Appendix F

With the issue thus framed, and conceding that no facts were in dispute, Searle then moved for summary judgment, asserting that the Cohns' claim was barred by the statute of limitations. Searle argued that the tolling provision was not applicable in this case because Searle was "represented" in New Jersey by its detail-persons. Alternatively, Searle contended that the tolling provision, if applicable to it, could not pass muster under the equal protection clause of the United States constitution in that it drew an arbitrary and irrational distinction between foreign corporations represented in New Jersey and foreign corporations not so represented, but which were nevertheless subject to New Jersey's long-arm jurisdiction.

The district court rejected Searle's argument that the presence of detail-persons in New Jersey afforded Searle the benefit of the statute of limitations. On the other hand, the district court accepted Searle's contention that the tolling provision was unconstitutional. 447 F. Supp. 903 (D. N.J. 1978). Reasoning that the tolling provision must be interpreted in light of the legislative intent at the *time of*

(Footnote continued from preceding page)

times of nonresidence or nonrepresentation. (emphasis added).

Plaintiffs claimed, alternatively, that the statute of limitations was tolled by N.J.S.A. §2A:14-21 which stops the running of the limitations period against persons who are "insane" when their causes of action accrue. In an unpublished opinion, the district court found that on this record, plaintiff's condition did not constitute insanity within the meaning of N.J.S.A. §2A:14-21. Consequently, the district court rejected this alternative argument. In light of our conclusion, *see infra*, that N.J.S.A. §2A:14-22 tolled the running of the limitations statute in this case, we need not, and do not, reach the merits of this contention.

its enactment, the court held that Searle's detail-persons were not adequate corporate "representatives" within the meaning of the tolling provision inasmuch as, as the time that provision was most recently amended, in 1949,[5] juris-

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[5] As the New Jersey Supreme Court has noted, the roots of the tolling provision are traceable as far back as 1820. *See Lempke v. Bailey*, 41 N.J. 295, 196 A.2d 523 (1963). In its original form, and up until 1949, however, the tolling provision made no specific reference to corporations. *Id.* (citing Pennington, *Laws of New Jersey, 1703-1820* at 670 (1821). As of 1949, the tolling provision, which thus denied both represented and non-represented foreign corporations the benefits of New Jersey's statutes of limitations, read as follows:

> If any person against whom there is or may be a cause of action specified in sections 2:24-1, 2:24-2, 2:24-3, 2:24-5, 2:24-6, 2:4-16 or 2:24-17 of this title is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, the time or times during which such person is not residing within this state shall not be computed as a part of the periods of time within which such actions are required to be commenced by said sections; and the person entitled to any such action may commence the same after the accrual of the cause thereof, within the periods of time limited therefor by said sections, exclusive of such time or times of non-residence.

N.J.R.S. §2:24-7.

In 1949, the tolling provision was amended to its present form, referring, for the first time, to corporations "*represented in this state* by any person or officer upon whom summons or other original process may be served." Act of May 18, 1949, 1949 N.J. Laws, ch. 125 (amending N.J.R.S. §2:24-7) (1937)) (currently codified at N.J.S.A. §2A:14-22) (emphasis added). The legis-

(Footnote continued on following page)

diction could be obtained over a foreign corporation only by serving, within New Jersey, an "officer, director, trustee or a managing or general agent of the corporation."[6] *In*

(Footnote continued from preceding page)

lative statement accompanying the 1949 amendments to the tolling provision explained this provision as follows:

> Foreign corporations licensed to do business in New Jersey are now deprived by judicial construction of the benefit of the statute of limitations. The purpose of this bill is to correct that situation. New York State found it necessary to make a similar change in its law in view of recent court decisions.
>
> The New York tolling law which is referred to in the legislative statement was N.Y.C.P.A. §19, which had been amended in 1943 so as to include as beneficiaries of the New York statutes of limitations, foreign corporations with "one or more officers or other persons in the state on whom a summons for such corporation may be served." Act of April 3, 1943, 1943 N.Y. Laws, ch. 263.

[6] In 1949, the New Jersey rules governing service of process on corporations were as follows:

> *N.J.R.S. §2:26-43. Domestic corporations in personal action, personal or substituted service summons.*
>
> Service of a summons in a civil action commenced against a domestic corporation in any of the courts of this State may be made by delivering a copy hereof to an officer, director, trustee or a managing or general agent of the corporation personally, or by leaving a copy thereof at his dwelling house or usual place of abode with some competent member of his family of the age of fourteen years or over then residing therein, or by delivering a copy thereof

(Footnote continued on following page)

personam jurisdiction over Searle, therefore, could not have been obtained by service on mere detail-persons. 447 F. Supp. at 909-10.

Having disposed of this statutory issue, the district court then turned to Searle's constitutional claims. The court observed that the purpose of the tolling provision, when it was originally enacted and as it was subsequently amended, *see* note 5 *supra*, was to protect New Jersey plaintiffs asserting causes of action against corporate defendants which were not subject to *in personam* jurisdiction in the New Jersey courts. In light of this purpose, the court concluded that the tolling provision was no longer relevant in cases where the out-of-state defendant was now subject to the long-arm jurisdiction of the New Jersey courts—a jurisdictional expansion which, in

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(Footnote continued from preceding page)

to any person authorized by appointment or by law to receive service of process on behalf of the corporation, or by leaving a copy thereof at the registered office of the corporation with any person in charge thereof.

N.J.R.S. §2:26-44. Foreign corporations.

Service of a summons in a civil action commenced against a foreign corporation may be made in the same manner as is provided in section 2:26-43 of the Revised statutes for service of summons upon a domestic corporation.

New Jersey's rule for long arm service was not promulgated until 1958, N.J. Ct. R.R. 4:4-4(d) (effective September 3, 1958) (presently N.J. Ct. R. 4:4-4(c)). *See* note 2 *supra*. It was not until 1971, however, that the New Jersey Supreme Court construed the long-arm rule to permit out-of-state service "to the uttermost limits permitted by the United States Constitution." *Avdel Corp.* v. *Mecure*, 58 N.J. 264, 277 A.2d 207 (1971).

New Jersy,[7] post-dated the 1949 amendment to the tolling provision. Therefore, the district court held that the continued application of the tolling provision in cases such as this one served no rational purpose and consequently violated the United States constitution. *See* 447 F. Supp. at 910-12.

Both parties appealed from the judgment of the district court. In No. 79-2605, Searle contends that the district court erred by concluding that the presence of its detail-persons in New Jersey did not entitle it to the benefit of the statute of limitations. In No. 79-2406, the Cohns argue, contrary to the district court's holding, that the tolling provision is a rational exercise of the legislature's prerogative and thus is constitutional.

B.

In the second appeal before us, *Hopkins* v. *Kelsey-Hayes, Inc.*, the plaintiff, Hopkins, was injured on May 18, 1975 when a tire mounted on a rim which had been manufactured by Kelsey-Hayes exploded. This lawsuit was filed on April 27, 1978, nearly three years after plaintiff's cause of action had accrued. Kelsey-Hayes is a Delaware corporation, which has never been represented in New Jersey. However, at all times it has been subject to New Jersey's long-arm jurisdiction.

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[7] The United States Supreme Court sanctioned broad long-arm rules in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), when it held that states could exercise *in personam* jurisdiction over out-of-state defendants with only "certain minimum contacts" with the forum state. Expansive long-arm jurisdiction in New Jersey was not recognized until much later, however. *See* note 6 *supra.*

Appendix F

Before a different district court judge than the judge who presided in *Cohn* v. *G. D. Searle, Inc.*, Kelsey-Hayes claimed the benefit of New Jersey's two year statute of limitations and moved for summary judgment. Plaintiff responded that the running of the limitations statute was tolled by N.J.S.A. §2A:14-22, *see* note 4 *supra*, and that therefore its complaint was not barred. Alternatively, the plaintiff argued that the statute was tolled under New Jersey's "discovery rule," *see Lopez* v. *Swyer*, 62 N.J. 267, 300 A.2d 563 (1973), *Fernandi* v. *Strully*, 35 N.J. 434, 173 A.2d 277 (1961), under which the statute does not begin to run until the plaintiff has had a reasonable opportunity to "discover" the identity of the person who caused his injury. At the pre-trial stage, Kelsey-Hayes responded only to the plaintiff's first argument. It claimed that the tolling provision, when applied to defendants subject to New Jersey's long-arm jurisdiction, violated the due process and equal protection clauses of the United States constitution.

In ruling on Kelsey-Hayes' summary judgment motion, the district court similarly confined its analysis to the constitutionality of the tolling provision. The district court judge in *Hopkins* expressly disagreed with the constitutional holding reached by the district court judge in *Cohn* v. *G. D. Searle, Inc., supra*. The *Hopkins* court concluded that since under New Jersey law, obtaining jurisdiction over non-represented foreign corporations process under the long-arm rule was more difficult than obtaining jurisdiction over foreign corporations which were represented in New Jersey, a rational basis existed for distinguishing between these two categories of defendants. Having found that this "rational basis" supported the tolling provision, the district court rejected both defendant's due process and

equal protection arguments. *Hopkins* v. *Kelsey-Hayes, Inc.*, 463 F. Supp. 539, 542 (D.N.J. 1978).

Pursuant to 28 U.S.C. § 1292(b), the district court and this court certified Kelsey-Hayes' interlocutory appeal from the order denying summary judgment.

C.

Shortly before we heard argument in these cases, counsel called our attention to *Velmohos* v. *Maren Engineering Corp.*, No. A-72/143 (N.J. Sup. Ct. June 18, 1980), a case which was at that time pending before the New Jersey Supreme Court. *Velmohos* involves the identical issues raised in these appeals.

In *Velmohos,* as in these cases, New Jersey plaintiffs had sued non-represented foreign corporations in tort, and had relied upon the tolling provision in response to a statute of limitations defense. The state defendants in *Velmohos* raised two arguments against application of the tolling provision. First, they claimed that their amenability to New Jersey's long-arm jurisdiction constituted sufficient "representation" within the state to entitle them to a limitations defense—in that case, two years. Secondly, they argued that, as applied to them, the tolling provision violated the federal constitution. In an unreported opinion, the state trial court in *Velmohos* struck down the tolling provision on federal constitutional grounds, adopting the reasoning of the district court in *Cohn* v. *G. D. Searle & Co., supra.* This decision was reversed by the Appellate Division of the Superior Court, which held that the tolling provision was rational and was thus constitutional. 168 N.J. Super. 520 (App. Div. 1979).

Appendix F

Notwithstanding the pendency of the *Velmohos* appeal before the New Jersey Supreme Court, we heard arguments on the merits in the appeals before us. Nevertheless, recognizing that certain holdings of the New Jersey Supreme Court would have binding effect upon us,[8] and at the suggestion of all the parties, we agreed to withhold decision in these cases pending the decision in *Velmohos*.

On June 18, 1980 the New Jersey Supreme Court filed its opinion in *Velmohos*, affirming the Appellate Division. *Velmohos* v. *Maren Engineering Corp.*, No. A-72/143 (N.J. Sup. Ct. June 18, 1980). The court, in construing the New Jersey statute which provides for tolling, held that a foreign corporation's mere amenability to New Jersey's long-arm jurisdiction did not constitute sufficient "representation" of that corporation in New Jersey to prevent the tolling of the statute of limitations. *Id.*, slip op. at 17. In so holding, the New Jersey Supreme Court reasoned that the "language [of the tolling provision] must be interpreted from the intent of the Legislature at the time of enactment." *Id.*, slip op. at 15. At the time the tolling provision was enacted, the concept of "representation" within New Jersey, as that term is used in the tolling provision, could not have included amenability to long-arm jurisdiction, because long-arm jurisdiction did not then exist. *See* notes 6 and 7 *supra*. Thus, the court reasoned that incorporating the judicial expansion of long-arm jurisdiction into its interpretation of

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[8] Any construction of the New Jersey tolling provision by the state's highest court would, of course, be binding upon us. Similarly, we would be bound if the New Jersey Supreme Court *struck down* the provision on *state* constitutional grounds. However, any decision of the New Jersey Supreme Court on *federal* constitutional grounds is not binding upon us.

the tolling provision would be accepting the argument that "a Rule of Court can act as an implied, partial repeal of a legislative enactment." This the Supreme Court of New Jersey refused to do, *Velmohos, supra,* slip op. at 16.

Having thus disposed of the defendants' statutory arguments,[9] the *Velmohos* court then proceeded to consider and, after consideration, to reject the constitutional challenges to the tolling provision. The court concluded that the existence of long-arm jurisdiction did not destroy the rationality of the tolling provision, observing that extra-territorial service is far more difficult to achieve than service within the state. *Id.,* slip op. at 23.[10]

Since *Velmohos* has been decided and we have received comments from the parties, we now turn to the issues presented to this court. We conclude that the defendants in both cases are subject to the New Jersey tolling provision and that the tolling provision does not violate the fourteenth amendment of the United States constitution.

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[9] Two justices dissented from the majority opinion in *Velmohos.* They would have construed the tolling provision as inapplicable to corporations which are amenable to long-arm jurisdiction. Consequently, they did not reach the constitutional questions. *See Velmohos* v. *Marne Engineering Corp., supra* (Sullivan, J. dissenting, joined by Handler. J.)

[10] The New Jersey Supreme Court observed that, had the statute been attacked under the New Jersey state constitution, its analysis and result would have been no different. *Velmohos, supra,* slip op. at 18-19 n.12.

Appendix F

II.

A.

The first step in our analysis of the merits of these appeals has been facilitated, to a great extent, by the opinion of the New Jersey Supreme Court in *Velmohos*. For after *Velmohos*, a corporation whose only "presence" in New Jersey is that it is amenable to the state's long-arm jurisdiction, clearly cannot argue that under the tolling statute it is "represented" in New Jersey so as to obtain the benefit of New Jersey's limitations statute.[11] In *Kelsey-Hayes*, this holding settles the statutory issue, enabling us to proceed directly to the constitutional question, because *Kelsey-Hayes*, the corporate defendant in that case, had no other "presence" in New Jersey apart from its amenability to long-arm jurisdiction.

In *Searle*, however, the statutory issue has not been completely resolved by *Velmohos* in light of the presence of Searle's detail-persons in New Jersey. The district court in *Searle* ruled that the existence of these detail-persons did not preclude the operation of the tolling statute, and Searle's appeal from that ruling is the subject of No. 79-2605. Although it has not expressly decided the issue before us, we are convinced from the *Velmohos* opinion, that the New Jersey Supreme Court would simi-

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[11] Many other state courts have construed their tolling provisions differently, so that out-of-state defendants amenable to long-arm jurisdiction would be exempt from the tolling rule. *See generally* Annot., *Tolling of Statute of Limitations During Absence from State as Affected by Fact that Party Claiming Benefit of Limitations Remained Subject to Service During Absence or Nonresidence*, 55 A.L.R.3d 1158. As the *Velmohos* majority points out, however, those cases involved different statutory language than the New Jersey tolling provision. *See Velmohos, supra* slip op. 14 & 14n.8

larly conclude that Searle's detail-persons are not the "representatives" contemplated within the tolling provision.

As previously indicated, in *Velmohos,* the New Jersey Supreme Court emphasized that the language of the tolling provision "must be interpreted from the intent of the Legislature in light of the circumstances at the time of enactment." *Velmohos, supra,* slip op. at 15. At the time the tolling provision was amended to refer to corporations which were "represented" in New Jersey, *see* note 5 *supra,* personal service upon minor functionaries such as Searle's detail-persons would not have sufficed to obtain jurisdiction over foreign corporations. *In personam* jurisdiction over foreign corporations could only have been obtained by service upon officers or duly appointed agents of the company. *See* N.J.S.A. §2:26-44 (repealed) (quoted in note 6 *supra*); *Porcelli* v. *Great Atlantic & Pacific Tea Co.,* 128 N.J.L. 603, 27 A.2d 641 (Sup. Ct. 1941); *cf.* N.J. Ct. R. 4:4-4(c)(1); *Wright* v. *News Syndicate Co.,* 35 N.J.Super. 133, 113 A.2d 215 (1955) (service on "any servant of the corporation" within New Jersey appropriate under current rules). Thus, the New Jersey legislature could not have intended that individuals such as Searle's detail-persons could obtain the benefits of the limitations statutes for their companies, particularly since the detail-persons had only a minimal affiliation with Searle and could not, at the time tolling provision was enacted, have subjected Searle to *in personam* jurisdiction in New Jersey.

Moreover, it is significant, as the New Jersey Supreme Court noted, *see Velmohos, supra,* slip op. at 15, that the tolling provision speaks of individuals who "represent,"

rather than just "act" for, the foreign corporation in New Jersey. By contrast, the applicable court rules of service speak only of "servants" who merely "act" in New Jersey. *See* N.J. Ct.R. 4:4-4(c)(1). It appears to us, therefore, that the statutory tolling provision contemplates a much more significant corporate figure or presence—one capable of "representing" the corporation—than does the service rule. This higher standard which requires "representation" in New Jersey before a foreign corporation can receive the benefits of the limitations statutes, comports with the original purpose of the tolling rule: to permit plaintiffs who have causes of action against foreign corporate defendants which are not represented in New Jersey, to maintain the viability of their actions despite the passage of time. Moreover, this purpose is consistent and compatable with New Jersey's policy of liberally construing limitations statutes so as to preserve, whenever possible, a plaintiff's opportunity to litigate his claim on the merits. *See Velmohos, supra, Galligan* v. *Westfield Centre Service, Inc.*, 82 N.J. 188, 412 A.2d 122 (1980).

Therefore, in light of its own statutory analysis, we are satisfied that the New Jersey Supreme Court, if faced with this question, would hold that Searle's detail-persons do not constitute "representation" of Searle in New Jersey, sufficient to provide New Jersey's limitations protections to Searle. To the contrary, we are convinced that the New Jersey Supreme Court would hold, and consequently we hold, that Searle's detail-persons do not exempt it from the tolling provision. Accordingly, unless the tolling provision is unconstitutional, and we conclude that it is not, the limitations statute will not bar the plaintiffs' claims against the defendants in both cases before us.

Appendix F

B.

Thus, there remains for consideration only the constitutional challenges made here to the tolling provision. The defendants concede that the tolling provision does not implicate any fundamental interest or suspect classification.[12] In these circumstances, we ordinarily afford great leeway to legislative judgments. As we recently stated:

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[12] Indeed, this concession would seem to be compelled by *Campbell* v. *Holt*, 115 U.S. 620 (1885) where the Supreme Court held that repeal of a statute of limitations as to debts which had already been barred did not implicate the fourteenth amendment rights of the debtor. In reaffirming *Campbell*, some 60 years later, the Court, speaking through Justice Jackson, stated:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation.[13] They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large decree of legislative control.

Chase Securities Corp. v. *Donaldson*, 325 U.S. 304, 314 (1945) (footnote omitted). Thus, it is clear that the defendants have no "right" to protection of the statute of limitations. Their only claim can be that the state legislature acted irrationally, under the circumstances, by denying them the benefit of the limitations statute.

Appendix F

> In reviewing a state statute or constitutional provision under the due process or equal protection clause, a court must determine if the provision rationally furthers *any* legitimate state objective. "For these purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision. . . ." *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960). The court may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack. *See Weinberger* v. *Salfi*, 422 U.S. 749, 780 (1975); *Williamson* v. *Lee Optical Inc.*, 348 U.S. 483, 487-90 (1955); *Trafelet* v. *Thompson*, 594 F. 2d 623, 626 (7th Cir.), *cert. denied*, —— U.S. ——, 48 U.S.L.W. 3239 (Oct. 1, 1979).

Malmed v. *Thornburgh*, No. 79-2467, slip op. at 7, (3d Cir. May 13, 1980) (Aldisert, J.) (emphasis in original). Thus, the defendants challenging the constitutionality of the tolling provision have the difficult burden of demonstrating that the provision cannot "rationally further[ ] *any* legitimate state objective." *Id.*

In seeking to meet this burden, the defendants argue that the tolling provision violates the constitution because it is overprotective.[13] They argue that the purpose

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[13] When no fundamental interests or suspect classifications are involved, both "underinclusive" and "overinclusive" statutes are subjected to the same "minimum rationality" test. Nevertheless, it has been argued that "overinclusive" or overprotective statutes present even less need for judicial action than statutes which are "underinclusive" in their regulatory sweep.

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of the tolling provision was to protect New Jersey plaintiffs who could not obtain *in personam* jurisdiction over out-of-state defendants.[14] The defendants contend that the tolling provision is no longer relevant or needed to promote this interest in cases where an out-of-state corporate defendant is amenable to New Jersey's long-arm jurisdiction. In such cases, they contend the plaintiffs may assert their causes of action and serve their complaints upon non-represented foreign corporate defendants in the same fashion as they serve domestic corpora-

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> "Overinclusiveness," a second variant of legislative approximation for which a classification may be overturned,[16] poses less danger than underinclusiveness, at least from the viewpoint of political accountability, for overinclusiveness does not exempt potentially powerful opponents from a law's reach.

L. Tribe, American Constitutional Law, 999 (1978). (Footnote omitted).

[14] In a technical sense, this appears to be an over-simplification. In 1949, the tolling provision was amended to exempt foreign corporations "represented in this state by any person or officer upon whom summons . . . may be served. . . ." Four years earlier, however, the Supreme Court had greatly expanded the states' jurisdictional powers over out-of-state defendants, permitting the state courts to exercise *in personam* jurisdiction over out-of-state defendants with "certain minimum contacts" with the forum state. *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945). Thus, at the time the tolling provision was last amended, New Jersey plaintiffs could have constitutionally obtained service on foreign corporations who did not have "representatives" in the state. The New Jersey courts did not recognize the full expanse of long-arm jurisdiction until much later, however. *See Avdel Corp.* v. *Mecure,* 58 N.J. 264, 277 A.2d 207 (1971); notes 6 and 7 *supra.*

tions or foreign corporations "represented" in New Jersey. Thus, they claim that the extra protection provided New Jersey plaintiffs by the tolling provision, is unnecessary and arbitrary in light of the original purpose of the tolling provision. Being arbitrary, they contend the statute is therefore unconstitutional.

The defendant's argument overlooks the fact that the tolling provision must be upheld if it "rationally furthers *any* legitimate state objective," without regard to whether the legislature specifically focused on that objective. *Malmed* v. *Thornburgh, supra.* In this case, at least one such legitimate objective is readily apparent: the tolling provision eases the burdens upon New Jersey plaintiffs prosecuting lawsuits against out-of-state defendant corporations which are not represented in New Jersey and which, in a great many instances, are difficult to locate and to serve, despite the availability of the long-arm rule. The New Jersey Court Rules, by their very terms, make clear that long-arm service may be utilized only as a last resort. They provide that service may be made

> [u]pon a domestic or foreign corporation, by serving . . . either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. *If it appears by affidavit of plaintiff's at-*

> *torney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing* and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

N.J. Ct.R. 4:4-4(c)(1) (emphasis added).

Moreover, Justice Pashman in writing for the New Jersey Supreme Court in *Velmohos* emphasized the special burdens which inhere in achieving long-arm service:

> Under our rules, extra-territorial service is not simply an alternative to service within the State. Plaintiffs may not resort to out-of-state service unless proper efforts to effect service in New Jersey have failed. The rule imposes a further burden on a plaintiff by requiring him to gather sufficient information to satisfy a court that service is "consistent with due process of law."

Velmohos, supra, slip op. at 23.

Since long-arm service is more difficult to achieve than service within the state, it is not irrational for New Jersey to distinguish between two classes of foreign corporations. Those foreign corporations which are represented in New Jersey, and are thus more readily available to plaintiffs, are afforded limitations protections. On the other hand, the limitations statutes are tolled against foreign corpora-

tions which are not represented in New Jersey and thus are not as available to New Jersey plaintiffs. This distinction betwen represented and non-represented foreign corporations reflects the pragmatic difficulties which may be encountered by plaintiffs suing foreign corporations. Since service of process under the long-arm statute is more difficult and time-consuming to achieve than service within the state, and since out-of-state, non-represented corporate defendants may be difficult to locate let alone serve, tolling the statute of limitations protects New Jersey plaintiffs and facilitates their lawsuits against such defendants. Because the tolling provision fulfills the legitimate state purpose of easing the special burdens of suits against non-represented foreign corporations, we cannot say that the distinction which it recognizes is irrational.[15]

In arguing against the constitutionality of the tolling provision, the defendants attempt to distinguish between the service of a complaint and the filing of a complaint. They point out that, under New Jersey practice, a plaintiff can

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[15] Although many courts have construed state tolling statutes so as to exempt individuals who are subject to service of process in the state, *see* note 10 *supra*, no court, other than the district court in *Cohn* v. *Searle*, *supra*, has concluded that such a result was mandated by the constitution. In fact, in *Vaughn* v. *Deitz*, 430 S.W.2d 487 (Sup. Ct. Tex. 1968), the Texas Supreme Court specifically upheld the Texas tolling statute against a constitutional argument identical to that raised here.

Moreover, in *Bauserman* v. *Blunt*, 147 U.S. 647 (1893), the Supreme Court gave effect to a Kansas statute which tolled the statute of limitations in an action against an out-of-state defendant who was nevertheless subject to service in the state. Although *Bauserman* did not discuss the constitutional issue, the court implicitly recognized the constitutionality of this type of tolling provision.

file a "John Doe" complaint, and thereby stop the running of the statute of limitations without having served the defendant with process. *See* N.J. Ct.R. 4:4-1 (summons must be served within 10 days of filing a complaint or action may be dismissed on defendant's motion). This procedure, they argue, enables a plaintiff to preserve his complaint against a statute of limitations defense, notwithstanding any later difficulties encountered in serving process. Because of this procedure, the defendants contend that the protection afforded by the tolling provision is superfluous and that the tolling provision is thus arbitrary, irrational and, consequently, unconstitutional.

We are not persuaded by the defendants' argument. In the first instance, the protection afforded plaintiff by the "John Doe" procedure is imperfect, at best. Complaints filed in this manner are subject to dismissal after six months on the court's own motion, unless the plaintiff, by proving his diligence, can convince the court to retain the case on the docket. N.J.Ct.R. 1:13-7. We do not believe that, given their crowded calendars, the state courts would permit a "John Doe" complaint to remain on the docket for a lengthy or indefinite period of time. Thus, the "John Doe" procedure does not, in fact, afford New Jersey plaintiffs the same protection as the tolling provision. Furthermore, the defendants' argument suffers from a more basic flaw. Even if the tolling provision could be considered superfluous in light of the "John Doe" procedure, this would not necessarily lead to our holding that the tolling provision is arbitrary or irrational. Nothing in law or logic prevents the New Jersey legislature from providing New Jersey plaintiffs with a mechanism for relief from the burdens of suits against non-represented foreign corporations which is additional to any mechanism found in the Court Rules.

Accordingly, since we find that N.J.S.A. §2A:14-22 has a rational foundation, and recognizing that rationality is the test for both due process and equal protection challenges in this context, *see Malmed* v. *Thornburgh, supra,* we reject the defendants' constitutional attacks on the statute.

III.

We therefore hold that the foreign corporate defendants in these cases, not being represented in New Jersey, are subject under New Jersey law to New Jersey's tolling provision, which we hold to be constitutional. Thus, in these cases, defendants may not claim the protection of the statute of limitations. In light of our conclusion, the interlocutory order of the district court which denied summary judgment in *Hopkins* v. *Kelsey-Hayes,* at No. 79-1881, will be affirmed, and the order of the district court in *Cohn* v. *G. D. Searle,* at Nos. 79-2406 and 79-2605, entering judgment for the defendant will be reversed. Each case will be remanded to the particular district court for further proceedings. Costs in each case will be taxed against the respective defendant.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit